IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LBL SKYSYSTEMS (USA), INC.	:	**CIVIL ACTION**
Plaintiff/	:	
Defendant on Counterclaim,	:	
	:	
v.	:	
	:	
APG-AMERICA, INC., and	:	
SENTRY SELECT INSURANCE	:	
COMPANY	:	
Defendants,	:	
	:	
APG-AMERICA, INC.	:	
Plaintiff on Counterclaim,	:	**NO. 02-5379**
	:	
v.	:	
	:	
XL SPECIALTY INSURANCE	:	
COMPANY and	:	
NAC REINSURANCE CORPORATION	:	
Defendants on Counterclaim.	:	
	:	

DUBOIS, J. **AUGUST 31, 2005**

TABLE OF CONTENTS

MEMORANDUM

I. INTRODUCTION

This case arises out of a dispute between a contractor, plaintiff LBL Skysystems (USA) ("LBL"), a subcontractor, defendant APG-America, Inc. ("APG"), APG's surety, defendant Sentry Select Insurance Company ("Sentry"), and LBL's sureties, counterclaim defendants XL Specialty Insurance Company ("XL") and NAC Reinsurance Company ("NAC"). The issues between these parties arise out of the construction of a new terminal, International Terminal One, and renovation of the adjacent terminal, Terminal A, at the Philadelphia International Airport (henceforth referred to collectively as the "Philadelphia Airport Project" or "Project").

In 1999, LBL entered into a contract (the "Prime Contract") with US Airways for the construction of curtainwall, insulated metal panels, skylights, and louvers at the Philadelphia

Airport Project.[1] APG entered into a written subcontract in 1999 (the "Subcontract") with LBL for the design, fabrication, and installation of an insulated metal panel wall system, which was part of the work covered by LBL's contract with US Airways. Sentry provided performance bonds (the "Performance Bonds") to APG, and XL and NAC provided a payment bond (the "Payment Bond") to LBL.

The dispute between the parties centers on the scope of APG's work under the Subcontract. The parties agree that APG was required to supply and install the insulated metal panels for all areas of the Philadelphia Airport Project, but disagree as to APG's responsibility for supplying and installing certain steel (referred to as "support steel" or "tube steel") necessary to support the panels. This dispute over the scope of APG's work ultimately led LBL to terminate the Subcontract on June 27, 2002, because of APG's refusal to supply and install the support steel that LBL determined was within APG's scope of work.

The instant suit is based on LBL's claim that the support steel in dispute was within APG's scope of work and that APG's refusal to perform this work was a breach of the Subcontract. In response, APG contends that it was not obligated under the Subcontract to install the disputed support steel and that it was wrongfully terminated by LBL. APG also argues, inter alia, that LBL failed to process change order requests ("CORs") that APG filed with LBL during the course of the Project and that the failure to process these CORs created serious financial problems for APG.[2] The parties' related claims and the facts underlying those claims are set

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[1]These terms, "curtainwall, insulated metal panels, skylights, and louvers," are terms of art from within the construction industry and are described infra.

[2] "[A] change order is a written order to the general contractor authorizing a change in the work to be performed under the contract or an adjustment in the contract sum or contract time. A

forth more fully below.

II. PROCEDURAL HISTORY

On July 25, 2002, after APG was terminated, LBL filed a Complaint against APG alleging, inter alia, that APG breached the Subcontract. On that same date, LBL filed a Petition for Preliminary Injunction and Temporary Restraining Order to compel APG to deliver insulated metal panels and related design drawings necessary to complete the Project. LBL contended that it had already paid APG for these panels and drawings. At a conference in Court on August 2, 2002, the parties arrived at a limited settlement under which LBL paid APG $575,000 for the panels and drawings at issue in the Petition.

On August 29, 2002, LBL filed an Amended Complaint against APG and Sentry, claiming damages on the grounds (1) that APG breached the Subcontract by failing to supply and install support steel included within its scope of work under the Subcontract, (2) that APG breached the August 2, 2002 settlement agreement by failing to provide all of the panels for which LBL had paid, and (3) that Sentry breached its obligation under the Performance Bonds by refusing to complete the full scope of APG's work under the Subcontract.

APG answered LBL's Amended Complaint, filed several counterclaims against LBL, and impleaded LBL's sureties, XL and NAC. APG contended, inter alia, that it was not in breach of the Subcontract, that LBL wrongfully terminated APG under the Subcontract, that the manner in which LBL terminated APG did not comply with the termination provisions of the Subcontract, and that LBL's failure to pay APG under the Subcontract violated the Contractor and

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COR is a document requesting a change order and describing the circumstances requiring the change order, including the costs associated with the change." Allied Fire & Safety Equipment Co., Inc. v. Dick Enterprises, Inc., 972 F. Supp. 922, 927 n. 5 (E.D. Pa. 1997)

Subcontractor Payment Act ("CASPA"), 73 P.S. § 501 et seq.

After extensive discovery, on November 25, 2003, LBL filed a motion for partial summary judgment on its Amended Complaint. APG and Sentry filed responsive cross-motions for summary judgment. On May 25, 2004, the Court granted summary judgment in favor of APG and Sentry with respect to LBL's claim that APG's alleged breach of contract caused LBL to incur damages in the form of a "lost settlement opportunity" with US Airways, but denied the

motions in all other respects. See LBL Skysystems (USA), Inc. v. APG-America, Inc., 319 F. Supp. 2d 515 (E.D. Pa. 2004).

The case was tried non-jury, beginning on November 8, 2004. The trial continued over sixteen days, many non-consecutive, before concluding with closing arguments on January 11, 2005.[3] Thereafter, the parties submitted supplemental memoranda and proposed findings of fact and conclusions of law.

III. FINDINGS OF FACT

The Court's Findings of Fact are made pursuant to Fed.R.Civ.P. 52(a). Where noted, the Findings of Fact are derived from stipulations of the parties.

A. Parties and Other Entities

1. LBL is a New York corporation with its principal place of business in New York. LBL specializes in supplying and installing custom designed curtainwall systems and contracted with US Airways to supply and install the curtainwall, insulated metal panels, skylights, and louvers for the Project. (Tr. 11/15/04 (Alibrando) p. 11).

2. APG is a New Jersey corporation with its principal place of business in New Jersey. APG subcontracted with LBL to supply and install the insulated metal panel system for the Project.

3. Sentry is an Illinois corporation with its principal place of business in Illinois. It is in the business of furnishing surety bonds in the construction industry, including, but not limited to,

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[3] At the close of LBL's case-in-chief on November 16, 2004, APG filed a motion for judgment on partial findings pursuant to Fed.R.Civ.Proc. 52(c). The Court denied this motion.

At the conclusion of trial on January 11, 2005, LBL filed a motion for judgment on APG's CASPA claim. The Court denied this motion.

performance bonds and labor and material payment bonds. Sentry furnished two performance bonds to APG.

4. XL is an Illinois corporation with its principal place of business in Illinois. XL is in the business of furnishing surety bonds in the construction industry. XL was LBL's payment bond surety for the Project.

5. NAC is a Connecticut corporation with its principal place of business in Connecticut. NAC is in the business of furnishing bonds in the construction industry. NAC was LBL's payment bond surety for the project.

6. The Philadelphia Authority for Industrial Development ("PAID") is the industrial development authority for the City of Philadelphia. (LBL's, XL's, and NAC's Requested Findings of Fact and Conclusions of Law ("LBL FOF") ¶ 1; Tr. 11/17/04 (Baxter) p. 208). PAID owns the land on which the Philadelphia International Airport is located. (May 7, 2004 Stipulation of Uncontested Facts ("Jt. Stip.") ¶ 1).

7. US Airways ("US Airways" or "Owner") is an international airline. It entered into a leasehold agreement with PAID for International Terminal One and Terminal A at the Airport. The leasehold was created to enable US Airways to proceed with the Philadelphia Airport Project as Owner. (Jt. Stip. ¶¶ 1-2).

8. Kohn Pederson Fox ("KPF") is the architectural firm engaged by US Airways as the lead consultant for the Project. (Tr. 11/8/04 (Mosellie) p. 99).

9. Severud Associates ("Severud") is the structural engineering firm engaged by KPF as the structural engineering consultant for the Project. (APG-America, Inc.'s and Sentry Select Insurance Company's Joint Proposed Findings of Fact and Conclusions of Law ("APG FOF") at

p. 10; Tr. 11/9/04 (Jijina) pp. 7-8). Severud provided the structural steel drawings for the Project. (Tr. 11/9/04 (Jijina) p. 8).

10. Cives Steel Company ("Cives") is a structural steel fabricator responsible for providing the structural framework of the Phildelphia Airport Project. (LBL FOF at ¶ 21; Tr. 11/18/04 (Kerr) p. 143).

11. Turner Construction Company ("TCC") was engaged by the Owner as the construction manager for the Project. (APG FOF at p. 9; Tr. 11/8/04 (Mosellie) p. 119).

12. Burns & McDonnell Engineering ("B&M" or "project manager") was the project manager for the Project. B&M was responsible for the day-to-day oversight of the Project, including the processing of claims and change orders. (Tr. 11/17/04 (Baxter) pp. 197-99).

13. Wheaton & Sprague ("W&S") is a structural engineering company retained by APG to design APG's insulated metal panel system, including the support steel, for the Philadelphia Airport Project. (Tr. 11/9/04 (Wheaton) p. 161-62). W&S created shop drawings for the fabrication and installation of the insulated metal panels and support steel for the panels. (LBL FOF ¶ 10; Tr. 11/9/04 (Wheaton) p. 160).

B. The Philadelphia Airport Project

1. Overview

14. The Philadelphia Airport Project involved 785,000 square feet of new construction and 100,000 square feet of renovated building area. (Tr. 11/8/04 (Mosellie) p. 100).

15. A project the size of the Philadelphia Airport Project would normally require twenty-six to thirty months to design and four to five years to build. (Tr. 11/8/04 (Mosellie) p. 100). Because of time considerations, the Project was planned as a "fast-track" project designed to

reduce the time necessary to design and build the project from six to seven years to a period of only thirty to thirty-two months. (LBL FOF ¶ 1; Tr. 11/8/04 (Mosellie) pp. 100-01).

16. In a traditional construction job, detailed drawings and specifications containing scope and specification information are published as the basis for contractors to submit "hard bids" for the construction. (LBL FOF ¶ 2; Tr. 11/8/04 (Mosellie) pp. 100-02). In the "fast-track" process in place at the Philadelphia Airport Project, the Owner adopted a "design-build" procedure under which KPF and its design consultants prepared schematic drawings and specifications intended to communicate "performance-based criteria"; the final design of the components and systems throughout the Project was completed by the contractors responsible for the construction. (Tr. 11/8/04 (Mosellie) p. 101-02).

17. As a result of the design-build nature of the Philadelphia Airport Project, the contractors were required to submit bids based on structural steel drawings that were incomplete. (Tr. 11/9/04 (Jijina) p. 50).

2. Layout of Philadelphia Airport Project

18. The schematic sector plan of the Philadelphia Airport Project is depicted on the "key plan." (LBL Exhibit 335). For purposes of this opinion and in the interest of consistency with the trial testimony, the Court will use the following terms for the various sectors of the Project:

Sectors 1-3:	Pier
Sectors 4-8:	Terminal
Sectors 9-12:	Federal Inspection Services ("FIS") Facility / FIS Soffit / North (Sector 12) Stair
Sector 13:	Arrivals Hall
Sector 14:	Recheck Bridge

(See LBL Exhibits 335, 503).

3. Curtainwall and Insulated Metal Panel Wall Panel Systems/Prime Contract and Subcontract

19. The building shell of the Philadelphia Airport Project consisted of a structural steel frame and a perimeter wall, or outer "skin," which was attached to the structural steel frame to enclose the building and make the building weathertight. (Tr. 11/8/04 (Mosellie) p. 139-40; LBL FOF ¶ 3). This perimeter wall was composed of curtainwall, insulated metal panels, skylights, and louvers. (LBL FOF ¶ 4; LBL Exhibit 62).

20. On or about May 20, 1999, US Airways issued an invitation to bid for the curtainwall, insulated metal panels, skylights, and louvers, identified as Bid Package PC.1100.3W, for the Project. (Jt. Stip. ¶ 2). The majority of the perimeter wall package consisted of the curtainwall and insulated metal panels. The skylights and louvers constituted a small percentage of the perimeter wall package. (Tr. 11/8/04 (Mosellie) p. 137; Tr. 11/15/04 (Alibrando) pp. 19-20, 26); LBL FOF ¶ 4).

21. On or about July 13, 1999, APG submitted a bid to LBL for the installation of the insulated metal panels on the Project. (Jt. Stip. ¶ 4). LBL used APG's bid as part of the bid that LBL submitted to USAirways for Bid Package PC.1100.3W. (Jt. Stip. ¶¶ 4-5; APG Exhibit 225). APG had initially submitted a separate bid for the insulated metal panel portion of this package, but the Owner requested that LBL include APG in LBL's bid so as to have a "one-source responsibility" for the bid package. (Tr. 11/23/04 (Beaucage) p. 246).

22. Prior to entering into a contract, APG and LBL met to review and discuss the scope of work, including any potential conflicts, for the insulated metal panels. (Jt. Stip. ¶ 7).

23. On or about September 3, 1999, US Airways presented LBL with a proposed contract for

the work covered in Bid Package PC.1100.3W. (Jt. Stip. ¶ 6).

24. By letter dated October 19, 1999, LBL advised APG of its intent to award the insulated metal panel subcontract to APG. (Jt. Stip. ¶ 8; see LBL Exhibit 14). APG began performing work on the Project in or around October, 1999. (Jt. Stip. ¶ 9).

25. On or about December 21, 1999, LBL entered into the written Subcontract with APG for the insulated metal panels at the Project. (Jt. Stip. ¶ 13). The original amount of the Subcontract was $9,919,390. (Jt. Stip. ¶ 14).

26. On or about December 22, 1999, US Airways, identified as "Owner," and LBL, identified as "Contractor," entered into a contract – the Prime Contract – under which LBL agreed to supply and install the curtainwall, insulated metal panels, skylights, and louvers described in Bid Package No. PC.1100.3W. (Jt. Stip. ¶ 11; LBL Exhibit 62). The original amount of the Prime Contract was $35,077,980, subject to certain cost allowances. (Jt. Stip. ¶ 12).

C. Payment and Performance Bonds

27. On December 10, 1999, APG obtained the Performance Bonds for the full amount of the Subcontract price. (LBL Exhibits 238, 240). The Performance Bonds were initially issued by John Deere Company, which subsequently sold its surety business to Sentry. Sentry assumed all of John Deere's obligations under the Performance Bonds. (Jt. Stip. ¶¶ 15-16).

28. On June 6, 2000, XL and NAC issued the Payment Bond to LBL, covering the amount of LBL's bid to US Airways for its work on the Project. (Jt. Stip. ¶ 17; LBL Exhibit 212).

29. The Performance Bonds named LBL as the Owner and APG as the Contractor. Paragraph 3 of the Performance Bonds specified that Sentry's obligation under the bonds arose as follows:

> 3. If there is no Owner default, the Surety's obligations under this bond shall arise

after:

3.1 The Owner has notified the Contractor and the Surety . . . that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default; and

3.2 The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract. Such Contractor default shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Subparagraph 3.1; and

3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a Contractor selected to perform the Construction Contract in accordance with the terms of the contract with the Owner.

(LBL Exhibits 238, 240).

The "owner default" referenced in paragraph 3.1 of the Performance Bonds is defined in the Performance Bonds as follows:

12.4 Failure of the Owner, which has neither been remedied or waived, to pay the Contractor as required by the Construction Contract or to perform and complete or comply with the other terms hereof.

(LBL Exhibits 238, 240).

D. Obligations of LBL and APG Under the Prime Contract and Subcontract

30. LBL was responsible for designing and installing the curtainwall, louvers, and skylights. APG was responsible for designing and installing the insulated metal panel system. That work was required to meet the performance criteria specified by KPF and its design consultants. (LBL FOF ¶ 6; Tr. 11/8/04 (Mosellie) p. 204-06).

1. LBL's Curtainwall

31. The curtainwall designed by LBL consisted of an aluminum grid composed of large vertical members and smaller horizontal members. This grid was attached to the primary structure of the building – i.e., structural steel – by anchors and embeds at the roof and floor slabs. Embeds are steel components designed to be cast into the concrete slabs of a building frame to serve as a point for securing the tube steel of a curtainwall using complementary steel components called "anchors." (Tr. 11/9/04 (Wheaton) pp. 190-92; Tr. 11/10/04 (Conly) pp. 143-44). Glass panels were then installed into the grid to enclose the building. (Tr. 11/15/04 (Alibrando) pp. 21-25; LBL FOF ¶ 7).

2. APG's Insulated Metal Panel Wall System

32. APG's insulated metal panel system consisted of insulated metal panels that were attached to support steel which was then attached to the structural steel of the building. (LBL FOF ¶ 11; Tr. 11/9/04 (Wheaton) p. 187). The metal panels formed the vertical walls of the building and the underside of the soffit area of the Project, which extended over passenger entrances and the railway and roadways. (LBL FOF ¶ 9; LBL Exhibit 393-H).

33. W&S designed the insulated metal panel wall system for APG. The W&S shop drawings included tube steel – support steel – for attaching the insulated metal panels to the structural steel in all areas of the Project. APG did not object to any of W&S's shop drawings. (Tr. 11/9/04 (Wheaton) p. 176; LBL FOF ¶ 31).

34. APG directed W&S to prepare embed drawings for each sector. (LBL FOF ¶ 33; Tr. 11/10/04 (Conly) p. 147). Embeds are steel components designed to be cast into the concrete slabs of a building frame to serve as a point for securing the tube steel of a metal panel wall system. (Tr. 11/9/04 (Wheaton) pp. 190-92). In some parts of an insulated metal panel system,

anchors – complementary pieces of steel – were attached to the embeds, tube steel necessary to support the insulated metal panels was then affixed to the anchors, and the insulated metal panels were attached to the tube steel. (Tr. 11/10/04 (Conly) p. 143-44; LBL FOF ¶ 33).

E. Scope of Work Under the Subcontract

1. Proposal Form

35. The scope of LBL's and APG's respective work is set forth in Article 2 of the Proposal Form attached to the Subcontract as follows:

> 2.0 Technical Scope of Work for Curtainwall/Metal Panels/Skylights/Louvers
>
> 2.1 This Contractor shall provide all labor, materials, devices, plants, tools, equipment, appliances, and services necessary for the production, fabrication, delivery, and erection of a complete Curtainwall/Metal Panels/Skylights/Louvers system. Work to include but not be limited to the following:
>
> A. General Items
>
> 1) Include all necessary structural steel and miscellaneous iron support members, tubes, clips, shapes, rods, cables, hardware, fasteners, etc. to support the work. <u>The structural steel sized and indicated on the structural steel drawings will be furnished and installed by the steel fabricator. Those items not shown, not sized, or indicated not to be by the steel fabricator are to be designed, engineered, fabricated, furnished and installed as the support system for the curtainwall, metal panel, skylight, and louver Contractor</u>.

(LBL Exhibit 13-B) (emphasis added).

36. Article 2.1(A)(1) of the Proposal Form allocates the responsibility for the design and construction of the areas at issue in the Philadelphia Airport Project between the structural steel fabricator, Cives, and the perimeter wall contractors, LBL and APG. (Tr. 11/19/04 (Robinson) p. 120; LBL FOF ¶ 4). Cives, the structural steel fabricator, was required to furnish and install all

steel that was "sized and indicated" on the structural steel drawings. If steel was not sized and indicated, it was to be designed, engineered, fabricated, furnished and installed as the support system for the curtainwall, metal panels, skylights, and louvers by the contractors responsible for that part of the Project.

37. Under Article 2.1(A)(1) of the Proposal Form, APG was required to design, engineer, fabricate, furnish and install all steel not sized or indicated that was necessary to support the insulated metal panels. LBL was responsible for designing, fabricating, furnishing, and installing all steel not sized or indicated that was necessary to support the curtainwall, skylights, and louvers.

2. Performance Specifications

38. The performance criteria for the insulated metal panel wall system were initially set forth in a two-page specification prepared by a consultant to KPF. (LBL FOF ¶ 6; LBL Exhibit 26-A). Richard Conly, APG's chief executive officer, testified that APG based its bid on that two-page specification. (Tr. 11/10/04 (Conly) pp. 16, 18).

39. An eight-page specification containing performance criteria for the insulated metal panel system was subsequently provided to APG in early June, 2001. (LBL Exhibit 161).

40. This eight-page specification later became part of a no-cost change order, Change Order 2, issued to APG by the Owner in early June, 2001. (Tr. 11/10/04 (Conly) pp. 18-21).

41. James Robinson, a structural engineer and witness for APG, testified that the materials covered by the eight-page specification did not include support steel. (Tr. 11/19/04 (Robinson) p. 137).

42. On June 12, 2001, APG rejected Change Order 2 and the associated eight-page

specification on the ground that the change order called for APG to use insulated metal panels different from those APG included in its original bid. (LBL Exhibit 402).

43. The Court finds that the eight-page specification does not support APG's claim that the support steel at issue was not within APG's scope of work.

3. Scope of Work Meetings: LBL/APG and Owner De-Scoping Meetings

44. After the bids for the various packages of work on the Project were signed, US Airways' project management team held a series of de-scoping meetings with the contractors whose bids had been accepted. The de-scoping meetings were designed to ensure that bidders included in their bids all elements of the work required by US Airways. (LBL FOF ¶ 30; Tr. 11/8/04 (Mosellie) p. 121).

45. The Project managers held a de-scoping meeting with LBL and APG on July 15, 1999, to review LBL's and APG's scope of work. (LBL FOF ¶ 30; Tr. 11/23/04 (Beaucage) p. 247). Anthony Mosellie, the Project architect, stated that the de-scoping meeting with LBL and APG was important because the support steel was not included in the Cives structural steel contract. (Tr. 11/8/04 (Mosellie) p. 121). At this meeting, LBL was asked, with APG present, whether LBL "had all of the structural steel support behind the metal panels," to which LBL responded in the affirmative. (Tr. 11/8/04 (Mosellie) p. 244).

46. Marc Rosenberg, APG's representative at the July 15, 1999 de-scoping meeting, did not raise any question at that meeting concerning which entity was responsible for the support steel and did not say that the support steel was not within APG's scope of work. (Tr. 11/8/04 (Mosellie) pp. 120-21).

47. Rosenberg and Alain Beaucage, respectively principals of APG and LBL, met after the

July 15, 1999 de-scoping meeting to discuss APG's insulated metal wall panel bid. (Tr. 11/23/04 (Beaucage) pp. 255-62). The notes of that meeting, written by Messrs. Beaucage and Rosenberg, include a breakdown of APG's bid for its insulated metal panel wall system. These notes show that APG's total bid included $4,261,120 of materials, of which approximately $1,575,000 represented insulated metal panels. The remaining approximately $2,686,000 of materials, identified by the word "steel" in Beaucage's handwriting, represented the support steel for APG's insulated metal panels. (Tr. 11/23/04 (Beaucage) pp. 255-62). Beaucage testified he wrote the word "steel" next to the $2,686,000 figure on APG's bid breakdown at that meeting based on his understanding from his discussions with Rosenberg that APG would provide the support steel for its insulated metal wall panel system. (Tr. 11/23/04 (Beaucage) pp. 255-62).

48. The Court finds that APG's conduct at the meetings in July, 1999 evidences the fact that the support steel for the insulated metal wall panels was within APG's scope of work and that such support steel was included in APG's bid.

4. Cives – Scope of Work

49. Cives's proposal to the Owner contained certain allowances that APG argued were intended to cover the "structural steel supports for the exterior skin of the building." (APG FOF at p. 23; (Tr. 11/18/04 (Kerr). pp. 144-45).

50. Cives's contract with the Owner included an allowance for "curtain wall supports or other uses as may be needed by the project."[4] (LBL Exhibits 179, 333) (emphasis added). The Cives representative, Robert Kerr, testified that this allowance was for "any miscellaneous added

[4]An allowance is "either a quantity or a dollar amount included in the contract to be used at the owner's discretion for additional work." (Tr. 11/18/04 (Kerr) p. 144).

support steel for the exterior panel system that wasn't currently shown or specifically shown on the original bid documents." (Tr. 11/18/04 (Kerr) p. 145).

51. US Airways' representative, Ken Wiseman, testified that the Cives allowances covered only support steel needed for the curtainwall and did not include support steel needed for metal panels. (Tr. 11/12/04 (Wiseman) pp. 21-22).

52. APG never communicated to Cives that APG prepared shop drawings showing support steel for the insulated metal panels for Cives' use in fabricating and installing the support steel. (Tr. 11/18/04 (Kerr) p. 187).

53. The Court finds that the Cives allowances did not include support steel for the insulated metal panels and that the support steel for the insulated metal panels was not within Cives' scope of work.

5. Structural Steel Drawings

a. Drawing S-404 – Typical Details

54. Structural steel drawing S-404, titled "Typical Details," depicts various metal structures in the Philadelphia Airport Project. (APG Exhibit 2-B). On the right side of this drawing is a label that reads, "Typical Exterior Metal Wall Panel Girts," and references three smaller drawings located immediately above the label. (APG Exhibit 2-B).

55. A note above the second of these three drawings reads, "TS 5 Girt Min. As Per Wall Manuf." (APG Exhibit 2-B). The "TS" in this notation refers to tube steel. (Tr. 11/9/04 (Jijina) p. 33). The phrase "5 Girt Min" in this notation refers to tube steel having a minimum width of five inches per face. "Girt" is a term used to describe the support structure for the insulated metal panels. (Tr. 11/9/04 (Jijina) p. 127-28). A girt may, but need not, be made of tube steel.

(LBL FOF ¶ 24; Tr. 11/18/04 (Dagit) p. 108).

56. The "Typical Exterior Metal Wall Panels Girts" detail shown on S-404 did not apply to the FIS Soffit sector of the project because the conditions shown in that detail were not present at the FIS Soffit. (Tr. 11/9/04 (Jijina) p. 29; Tr. 11/9/04 (Wheaton) p. 201-02; LBL FOF ¶ 49).

b. Significance of "TS 5 Girt Min." Notation on S-404

57. APG took the position that the "TS 5 Girt Min." notation on drawing S-404 referred to a "sized" steel member within the "sized and indicated" language of Section 2.1(A)(1) of the Proposal Form, and that APG was not responsible for installing such steel members.

58. The Project architect testified that the "TS 5 Girt Min." notation on drawing S-404 did not refer to "sized" tube steel because that notation lacks information concerning the tube steel's thickness and that the notation was intended only to establish a minimum performance criteria. (LBL FOF ¶ 25; Tr. 11/8/04 (Mosellie) pp. 163-65). He further stated that the ". . . 5 Girt Min" language of this notation was merely to reserve a "right of way" along the building perimeter so as to avoid conflicts with mechanical equipment or the primary steel structure. (Tr. 11/8/04 (Mosellie) p. 164; LBL FOF ¶ 25).

59. Cawsie Jijina, the structural engineer responsible for preparing the structural steel drawings, testified that the notation "TS 5 Girt Min" did not refer to tube steel that was sized because the notation did not provide sufficient information for a contractor to purchase the steel. (LBL FOF ¶ 26; Tr. 11/9/04 (Jijina) pp. 33-34). He testified that a sized structural element must have three dimensions and the "TS 5 Girt Min" notation provided only one dimension; "[I]n order to size it [the structural element] you need to have two plan dimensions and either a weight or a wall thickness. There have to be three parameters to size a structural element." (Tr. 11/9/04

(Jijina) p. 33).

60. Jijina testified that providing only a single dimension in the notation was intended to signal that another engineer was needed to complete the design of the element. (LBL FOF ¶ 26; Tr. 11/9/04 (Jijina) p. 33). He also testified that the drawings were intentionally incomplete and were intended only to communicate baseline performance criteria to the contractors; the contractors were responsible for executing the final design of the various elements comprising the Project. (Tr. 11/9/04 (Jijina) p. 50).

61. Charles Dagit, an architect and a witness for APG, testified that tube steel has three variables or dimensions. Tube steel described by a single dimension can not be purchased. A three-dimensional description is required in order to purchase tube steel. (Tr. 11/18/04 (Dagit) p. 109).

62. Robinson testified in his January 8, 2004 deposition, that if he was told by a buyer of tube steel to provide "TS 5 Girt Min.," he would ask the buyer for a size. (Tr. 11/19/04 (Robinson) p. 172; LBL FOF ¶ 28).

63. John Wheaton, the structural engineer engaged by APG to prepare shop drawings and design APG's insulated metal panel system, including the support steel, testified that he determined the dimensions of the tube steel by "performing a structural analysis of that member and . . . sizing it." (Tr. 11/9/04 (Wheaton) p. 171). He further testified that steel addressed by the "TS 5 Girt Min" notation was not sized because "a size is suggested but it's not sized because in order to be sized it has to be a complete – the complete descriptive sizing of the steel." (Tr. 11/9/04 (Wheaton) p. 186; LBL FOF ¶ 27).

64. Located above the "Typical Exterior Metal Wall Panel Girts" label and associated

diagrams on S-404 is an additional label that reads, “Typical Shaft Post Details.” (APG Exhibit 2-B). Above this label is a diagram depicting a tube steel structure; located above this diagram is a note that reads, “[Centerline] Tube TS 5 x 5 x .375.” (APG Exhibit 2-B). The structural engineer testified that this notation denotes steel that was “fully sized.” (Tr. 11/9/04 (Jijina) p.

45). The Court finds that the "TS 5 x 5 x .375" notation demonstrates that the structural engineer was capable of specifying sized elements where that was intended.

c. Structural Steel Drawings S-240 – Arrivals Hall; Structural Steel Drawing S-141 – Sector 1 Pier

65. Structural steel drawing S-240 depicts the frame elevations for the Arrivals Hall, Sector 13 of the Philadelphia Airport Project. (APG Exhibt 2-E). A note at the top of this drawing reads, "Metal Wall Panels & Girt Tubes By H.H. Robertson or Equal." (APG Exhibit 2-E).

66. Structural steel drawing S-141 depicts the framing plan at the third floor of the pier located at Sector 1 of the Project. (APG Exhibit 2-A).

67. A note at column P5 on drawing S-141 states, "Metal Panel Wall and Girt by H.H. Robertson or Equal See Arch. Dwgs & Dwg. S404." (APG Exhibit 2-A). Notes at columns P2 and P4 on drawing S-141 state, "TS Trussed Girt Frames @ 5'-0" o.c. Per Wall Panel Manuf See Dwg S404 & S240 Similar." (APG Exhibit 2-A).

68. APG argued that elements labeled "by H.H. Robertson or Equal" were the responsibility of APG and elements labeled "Per Wall Panel Manuf" were to be installed by another party according to APG's instructions. (APG FOF at p. 18; Tr. 11/19/04 (Robinson) pp. 121-22).

69. Jijina, the structural engineer, testified that there was no distinction between the words "by" and "per" as used on the structural steel drawings and he was unaware of any distinction in the use of these terms within the industry. (LBL FOF ¶ 39; Tr. 11/9/04 (Jijina) p. 20). The Court credits Jijina's testimony on this issue and finds that references to "by" and "per" on the structural steel drawings meant essentially the same thing and that APG was responsible for supplying all tube steel identified as "by H.H. Robertson or Equal" and "[p]er Wall Panel

Maunfacturer."

70. The Court finds that the evidence concerning the structural steel drawings supports the conclusion that the support steel at issue – identified as "TS 5 Girt Min." – was not "sized and indicated" within the meaning of Article 2.1(A)(1) of the Proposal Form.

71. The Court finds that the evidence concerning the structural steel drawings evidences the fact that the support steel at issue was within APG's scope of work under the Subcontract.

6. APG's Conduct Relating to Scope of Work

a. APG's Shop Drawings

72. APG engaged W&S to design the insulated metal wall panel system for the Philadelphia Airport Project. APG had engaged W&S on approximately twenty projects prior to the Philadelphia Airport Project. (Tr. 11/9/04 (Wheaton) p. 158-60).

73. W&S prepared shop drawings for APG's insulated metal panel wall system. These drawings depicted tube steel at all areas of the Project within APG's scope of work. W&S's shop drawings identify items not to be provided by APG as "not by client" or "by others." No such references appear on the support steel shown on the shop drawings. (LBL FOF ¶ 31; Tr. 11/9/04 (Wheaton) p. 175). APG did not object to any of W&S's shop drawings that depicted support steel throughout the Project within APG's scope of work. (Tr. 11/9/04 (Wheaton) p. 176; LBL FOF ¶ 31).

74. Representatives of both KPF and Cives testified that they had never encountered an arrangement under which a metal panel wall contractor would design support steel to be installed by a structural steel contractor. (Tr. 11/8/04 (Mosellie) p. 122; Tr. 11/18/04 (Kerr) pp. 187-88; LBL FOF ¶ 42).

75. APG directed W&S to create embed drawings for each sector. The Project architect testified that it was not typical for the entity that designed the embeds not to install anchors onto the embeds and install associated support steel onto the anchors. (Tr. 11/8/04 (Mosellie) p. 178; Tr. 11/9/04 (Wheaton) p. 192; LBL FOF ¶ 33).

76. The Court finds that the W&S shop drawings showing support steel throughout the Project as part of APG's scope of work and APG's failure to object to these drawings supports the conclusion that the support steel at issue was within APG's scope of work.

b. APG's Value Engineering at the FIS Soffit

77. The insulated metal panel soffits at the FIS Soffit location were to be hung from the horizontal members of the structural steel at that location, and certain portions of that soffit presented a saw-toothed profile. (LBL FOF ¶ 13; Tr. 11/9/04 (Wheaton) pp. 193-201; LBL Exhibit 24).

78. In December 1999, during the design process, APG suggested creation of an aluminum supergrid support system instead of individual steel girts as the means of attaching the insulated metal panels at the FIS Soffit to these saw-tooth areas. (LBL FOF ¶ 13; LBL Exhibit 24). Using aluminum instead of steel at the FIS would reduce material costs. (Tr. 11/9/04 (Wheaton) pp. 282-83). APG proposed that this aluminum supergrid be assembled at its facility. (LBL FOF ¶¶ 13, 51; LBL Exhibit 24).

79. The Court finds that APG's design of the supergrid and use of aluminum instead of steel at the FIS Soffit is consistent with the contract interpretation requiring APG to furnish and install the support steel for its insulated metal panels.

c. APG's Work Schedules

80. APG's work schedule of September 11, 2000, created before the October 30, 2000 fax memorandum from LBL that APG claimed was a "directive" to install support steel outside of APG's scope of work, see infra, shows that APG planned at that time to install all components of its insulated metal panel wall system (including the support steel) except for the embeds. The September 11, 2000 APG work schedule covered attaching anchors to the embeds, attaching tube steel girts to the anchors, and attaching insulated metal panels to the tube steel girts. (LBL FOF ¶ 34; LBL Exhibit 566). These activities are shown as consecutive events on this schedule without any intervening predecessor activities. (LBL Exhibit 566). A predecessor activity meant that APG believed some other contractor was responsible for that activity and that such activity had to be completed before APG could continue with its work. (LBL Exhibit 566; Tr. 11/10/04 (Conly) pp. 156-62). The absence of predecessor activities on the September 11, 2000, work schedule shows that APG believed that the tube steel girts were within its scope of work at that time.

81. On APG's September 11, 2000 work schedule, activities to be carried out by other contractors are identified by the word "Restraint." (LBL Exhibit 566). None of the activities on this work schedule concerning the installation of anchors or girts for the insulated metal panel system is marked with a "Restraint" reference.

82. APG's work schedule for March 13, 2001 shows that APG planned at that time to install all components of its insulated metal panel wall system aside from the embeds. (LBL Exhibit 503). None of the activities on this work schedule concerning the installation of anchors or girts includes a "Restraint" reference. (LBL Exhibit 503).

83. The APG work schedules before (September 11, 2000) and after (March 13, 2001) the

October 30, 2000 “directive” were essentially the same. Both work schedules support the determination that support steel for the insulated metal panels was within APG’s scope of work.

d. APG’s Installation of Tube Steel at Sector 1 Pier

84. In May, 2001, APG determined that certain horizontal structural steel in the primary building structure at the Sector 1 Pier interfered with APG’s installation of vertical tube steel used to support the insulated metal panels at that location. (LBL Exhibit 166; Tr. 11/9/04 (Wheaton) p. 188). APG resolved this issue by notching its tube steel at this sector of the Project

to accommodate the structural steel. (LBL Exhibit 576; Tr. 11/9/04 (Wheaton) p. 188-89; LBL FOF ¶ 36).

85. The Court finds that APG's notching of the tube steel at the Sector 1 Pier is consistent with the determination that APG was responsible for supplying and installing the support steel at issue.

7. Correspondence Regarding Framing and Structural Steel

86. On April 5, 2000, APG wrote to LBL, taking the position that the steel framing for certain windows and louvers on the Project was not within APG's scope of work. (APG FOF at p. 26; APG Exhibit 309).

87. In an April 10, 2000 letter to LBL, APG reiterated that it would not supply steel window framing and would not supply steel for "any openings that are not part of our contract." (APG FOF at p. 26; LBL Exhibit 22). In that April 10, 2000 letter, APG stated, "APG owns the panel contract, and we have full intentions of supporting our own work. Work by others needs to be supported by the contractor who is supplying that portion of the work." (APG FOF at p. 26; LBL Exhibit 22). The Court finds that the statement in APG's letter that "APG owns the panel contract, and we have full intentions of supporting our own work . . . ," supports the determination that the support steel was within APG's scope of work.

88. On August 28, 2000, APG notified LBL that APG would "not provide steel for the main terminal north side stair tower. If you want Wheaton [W&S] to provide the design, we will gladly provide his services to you." (APG Exhibit 388; APG FOF at p. 19). On August 31, 2000, LBL raised this same issue with TCC in a fax memorandum with the subject heading, "Stair @ North Wall Stair . . . Sector 12," stating in the memorandum that "there seems to be a confusion

about the steel structure at these stairs and who is responsible to provide it . . . If there is an [sic]

need for steel substructure between panels and main structure it would then be by us." (LBL Exhibit 79; APG FOF at p. 19) (emphasis added).

89. APG took the position in a fax memorandum sent to LBL on October 25, 2000 that its scope of work included only "our girts" and did not include "main steel." (LBL Exhibit 63) (emphasis added). Salvatore Alibrando, an LBL manager assigned to the Philadelphia Airport Project, testified that APG's October 25, 2000 memorandum referred only to the fact that the structural steel drawings for the Sector 12 Stair did not depict structural steel to which APG could attach the insulated metal panels; it did not refer to other areas of the project. (Tr. 11/15/04 (Alibrando) p. 61; see also LBL Exhibit 87). LBL responded to APG with a fax memorandum on October 30, 2000, in which LBL explained that APG was obligated to carry out the work described in the Subcontract and stated, "under no circumstances is work to be stopped or delayed." (LBL Exhibit 76). APG referred to LBL's October 30, 2000 fax memorandum as a "directive." (Tr. 11/10/04 (Conly) p. 77).

90. The Court finds that APG's October 25, 2000 memorandum dealt with structural steel – and not support steel – at the Sector 12 Stair area of the Project and that LBL's October 30, 2000 fax memorandum to APG addressed only that issue and did not direct APG to install support steel outside of APG's scope of work under the Subcontract.

91. APG points to the language in the APG Bid dated July 12, 1999, that "[a]ll support steel as supplied by others must be of sufficient size and strength . . . so as not to prevent our materials from performing as specified," in support of its argument that the support steel was not within its scope of work. (APG FOF at p. 28; LBL Exhibit 63). However, the "Work Included" section of the APG Bid specifically includes "Galvanized steel support girts." (LBL Exhibit 63). The

Court finds that the July 12, 1999 APG Bid evidences only that APG required that any support

steel furnished by other entities not interfere with the performance of APG's materials and does not establish that the support steel at issue was to be furnished by other entities.

92. APG argues that the language – "[h]ad the tubular support steel been designed and installed by others (as we quite reasonably had expected based on 60% drawings), it would not have been galvanized" – in an October 31, 2001 letter from APG to LBL supports its argument that the support steel was not within its scope of work. (APG Exhibit 1225). The Court finds that this letter addressed allegations that APG's support steel did not comply with the contract provisions requiring that steel support girts be galvanized; the letter is not evidence that the support steel was not within APG's scope of work.

93. In February, 2001, LBL issued a memorandum directing APG to perform extra work unrelated to the support steel at issue. In responding to this memorandum on February 21, 2001, APG insisted that LBL follow the procedures set forth in the Subcontract regarding directives to perform additional work by including a provision for payment for the additional work; "[b]ecause the Change Directive referred to in your memo does not address the most important aspect, payment for the extra work, we must consider it invalid. Therefore, please be advised that we cannot proceed with the work unless and until the issue of adjustment to the contract price is addressed." (LBL Exhibit 432; LBL FOF ¶ 35).

94. Unlike its response to LBL's February 2001 memorandum directing performance of extra work unrelated to support steel, APG did not respond to LBL's October 30, 2000 "directive" by refusing to proceed with installation of support steel until a corresponding adjustment in the contract price was made.

95. The Court finds that the foregoing correspondence does not establish that APG

questioned whether the support steel at issue was within its scope of work.

F. Payment and CORs

1. Contractual Payment Provisions

96. Pursuant to Article 11 of the Subcontract, progress payments from LBL to APG were to be made within five working days after LBL received payment from the Owner:

> 11.3 . . . The Contractor shall pay the Subcontractor each progress payment within five working days after the Contractor receives payment from the Owner.

(LBL Exhibit 13-B).

2. Change Order 2

97. On October 17, 2000, LBL and APG signed Change Order 2. (LBL Exhibit 287). By signing Change Order 2, the parties agreed, inter alia, to a mechanism – the Funds Agreement – by which a third party – a Funds Administrator – would disburse payments to APG.

a. Funds Agreement

98. LBL initially failed to obtain payment bonds required under the Prime Contract, causing delays in payments to APG. As a result, on October 17, 2000, LBL and APG entered into the Funds Agreement under which a third party, the Funds Administrator, received all payments for APG and LBL directly from the Owner and then disbursed those payments to LBL and APG. (LBL Exhibit 287; LBL FOF ¶ 54).

99. The payment provisions in the Funds Agreement read as follows:

5.1.0 Contractor [LBL] and Subcontractor [APG] authorize and instruct Funds Administrator to hold all of the Contract Proceeds. Once finalized Contractor shall provide Funds Administrator a fully executed copy of the AIA Pay Request as approved by the Owner / CM or Owner's / CM's representative detailing each incremental pay request, including any past pay requests. Further, once finalized the Subcontractor shall provide Funds Administrator a fully executed copy of the AIA Pay Request as approved by the Owner / CM or Owner's / CM's representative detailing each incremental pay request, including any past pay requests.

5.1.1 Disbursement to the Contractor shall be the amount of Contract Proceeds fully approved and funded by owner representing Contract Work, less that amount of Subcontract Proceeds representing Subcontractor Work . . . Failure of Subcontractor to timely submit acceptable pay requisition shall result in Funds Administrator relying solely on Contractor's pay requisitions to complete disbursement.

5.1.2 Disbursement to the Subcontractor shall be the amount of Subcontract Proceeds approved and funded by owner representing Subcontract Work as indicated on the Contractor's fully executed copy of the AIA [American Institute of Architects] Pay Request less Contractor's mark up and less contractual retainage. (payment to subcontractor as per approved schedule of value attached hereto) [sic]

(LBL Exhibit 287). Pursuant to the Funds Agreement, LBL did not receive any funds that US Airways had earmarked for disbursal to APG.

100. The Funds Agreement contains a payment clause that reads as follows:

5.2.0 Disbursements are anticipated twice monthly. However, <u>disbursement will be processed as funds are received</u>.

(LBL Exhibit 287) (emphasis added).

101. The Funds Agreement provides as follows with respect to payments due to APG in the event that APG was found in default:

5.5.0 In the event that any of the following occurs, Subcontractor's proceeds in the Funds Administration Account pursuant to the Agreement, shall be disbursed only with the written consent of both the Contractor and Subcontractor, or by proper court order:

(A) Subcontractor is in default of its obligations under this Agreement.

. . .

(LBL Exhibit 287).

b. APG Inclusion in COR Meetings

102. The following paragraph was added to the Subcontract pursuant to Change Order 2:

> 3.2.7 Contractor shall endeavor to obtain permission from the CM [the construction manager] for representatives of the Subcontractor to be present at all meetings with the CM, Architect, Engineer and/or Owner, if any work relating to the Subcontractor is on the agenda. Subcontractor will be permitted to participate in progress meetings, and to negotiate directly, with Contractor present, their Payment Applications, Change Orders, and Claims.

LBL was obligated under Change Order 2 to endeavor to obtain the Project construction manager's permission for APG to attend any meetings regarding APG's work.

103. APG attended change order meetings until it was excluded from such meetings by US Airways because of APG's April 4, 2002 letter, discussed infra, in which APG, through an attorney, challenged the scope of its work under the Subcontract.

G. Acceleration Change Order – Change Order 7

104. On May 23, 2001, the Owner and LBL signed Change Order 7. (LBL Exhibit 80). Pursuant to Change Order 7, LBL received $1,000,000 in exchange for accelerating its curtainwall work. (LBL Exhibit 80; LBL FOF ¶ 73). Change Order 7 did not address support steel issues – it states, "LBL/APG panel work is not included within the Agreement." (LBL Exhibit 80; Tr. 11/12/04 (Wiseman) pp. 16-17).

105. The Owner elected to keep Change Order 7 confidential to prevent contractors on the Philadelphia Airport Project other than LBL from learning of this arrangement. (Tr. 11/12/04

(Wiseman) p. 19). LBL did not suggest that Change Order 7 be kept confidential or request that this change order not be disclosed to APG. (Tr. 11/12/04 (Wiseman) pp. 19-20).

106. Change Order 7 did not require LBL to furnish any new materials in addition to the steel already identified in Section 2.1(A)(1) of the Proposal Form as not "sized or indicated." (Tr. 11/12/04 (Wiseman) pp. 191-93).

107. The Court finds that Change Order 7 did not cover compensation for insulated metal panel work performed by APG.

H. Processing of Change Order Requests – CORs

1. Contractual Provisions Relating to Change Orders

108. The Prime Contract states as follows with respect to change orders:

> **14.2 CLAIMS** A claim is a demand or assertion made in writing by the Contractor seeking an adjustment in the Contract Price and/or Contract Time . . . The Contractor shall give the Owner and Construction Manager written notice of all claims within five (5) Business Days of the date when the Contractor knew of the facts giving rise to the event for which a claim is made. Notwithstanding anything to the contrary contained in this Agreement, any claim by the Contractor for an extension of the Contract Time and/or Contract Price must be made by proposing a Change Order within five (5) Business Days after the event giving rise to the claim, otherwise, it shall be deemed waived.

(LBL Exhibit 62).

109. The Subcontract states as follows with respect to change orders:

> 5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

(LBL Exhibit 13-B).

2. COR Backlog and "Choking" of APG

110. Chris Baxter, a representative of B&M – the project manager – testified that he and his staff were responsible for processing the CORs submitted on the Project. (Tr. 11/17/04 (Baxter) p. 220). There were 3800 CORs submitted on the Project over a period of 40 months. (Tr. 11/17/04 (Baxter) p. 223). This created a backlog of change orders. No COR was ever denied solely for being untimely. (Tr. 11/17/04 (Baxter) pp. 220-21, 224).

111. APG argued that it encountered cash flow problems on the Project because CORs it filed while performing its work were not promptly processed by LBL and APG was owed millions of dollars at the time that APG reduced its Project workforce in May, 2002. (APG Exhibit 145-B; Tr. 12/7/04 (Zaucha) pp. 93-100; APG FOF at pp. 33, 40). APG claimed that it was justified in stopping work on the Project because it was being "choked" by non-payment for work that it had performed.

112. Both LBL and APG experienced slow processing of their CORs. (LBL FOF ¶ 51; Tr. 11/15/04 (Alibrando) p. 227; Tr. 12/7/04 (Zaucha) pp. 83-85).

113. On March 15, 2002, LBL and APG met in Montreal, Canada, to discuss, inter alia, the processing of APG's CORs. (Tr. 12/7/04 (Zaucha) p. 99). Edward Zaucha, one of APG's principals, testified that at the end of that meeting, LBL told APG to price and submit its CORs. (APG FOF at p. 33; Tr. 12/7/04 (Zaucha) p. 100).

114. Alibrando, LBL's representative, testified that APG's CORs were untimely, poorly documented, and lacked merit. (Tr. 11/15/04 (Alibrando) pp. 226, 253-54; Tr. 12/17/04 (Alibrando) p. 12; see also LBL Exhibit 89).

I. Contractual Provisions Governing Continued Performance of Work

115. Paragraph 19.14 of the Prime Contract provides that, "in the event of any dispute between

the Owner and the Contractor, the Contractor shall expeditiously proceed with the performance of the Work." (LBL Exhibit 62).

116. Paragraph 2.1 of the Subcontract states,

> The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions [of] the U.S. Airways General Conditions apply to this Agreement pursuant to Paragraph 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect . . . Where a provision of such documents [the Prime Contract] is inconsistent with a provision of this Agreement, this Agreement shall govern.

(LBL Exhibit 13-B).

117. Paragraph 2.1 of the Subcontract incorporated the provisions of the Prime Contract to the extent that the provisions of the Prime Contract were not inconsistent with the provisions of the Subcontract. No provision of the Subcontract is inconsistent with the requirement of paragraph 19.14 of the Prime Contract that the Contractor's work on the Project proceed in the event of a dispute between the Owner and Contractor, and the Court finds that paragraph 2.1 of the Subcontract incorporated paragraph 19.14 of the Prime Contract into the Subcontract.

118. LBL and APG agreed to remove paragraph 4.7.1 from the Subcontract before signing it. That paragraph provided:

> 4.7.1 If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other remedies, upon seven additional days' notice to the Contractor, stop the work of this Subcontract until payment of the amount owing has been received . . . .

(LBL Exhibit 13-B) (emphasis added).

119. APG agreed to the deletion of the above underlined provision in the Subcontract that

provided for its right to stop work if it was not paid by LBL.

120. The incorporation of paragraph 19.14 of the Prime Contract – which required that LBL continue work on the Project regardless of any dispute between it and US Airways – into the Subcontract and the fact that APG agreed to delete a provision of the Subcontract that allowed it to stop work for nonpayment support the conclusion that APG was obligated to continue work on the Project notwithstanding its disputes with LBL.

J. Events Preceding Default of APG by LBL

1. APG Challenges the Scope of its Work

121. On April 4, 2002, APG challenged the scope of its work under the Subcontract. (LBL Exhibit 25). On that date, APG, through counsel, first advised LBL of its position that it was not responsible for support steel in the Recheck Bridge, FIS Soffit, and "miscellaneous other areas" of the Project and stated that it would not supply or install support steel in these areas unless a change order was issued by LBL or US Airways. APG also requested "an extra for structural tube steel in the FIS soffit area." (LBL Exhibit 25; LBL Exhibit 46; LBL FOF ¶ 15).

122. In an April 16, 2002 letter to LBL, APG took the position that although the disputed support steel was depicted in APG's shop drawings, W&S "was not specifically informed that the structural support tubes used in the Arrivals Hall (the first area drawn by APG – that was clearly to be supplied and installed by APG) did not extend to the balance of all metal panel work covered by the scope of APG's contract." (LBL Exhibit 46).

123. In a letter dated April 18, 2002, APG asserted that it was responsible for support steel for its insulated metal panels only in the football-shaped Arrivals Hall area of the project. (LBL FOF ¶ 38; LBL Exhibit 8).

124. LBL disagreed with APG but conveyed APG's position as stated in the April 4, 2002 letter to the Owner. The Owner rejected as without merit APG's claim that the support steel at issue was not within its scope of work. (Tr. 11/12/04 (Wiseman) pp. 27-29; Tr. 11/16/04 (Brais) pp. 60-62).

125. Following the April 4, 2002 letter, APG submitted numerous CORs to LBL. (LBL 66-D). APG did not submit CORs regarding disputed support steel at the Sector 1 Pier, Terminal, and FIS Soffit areas of the project until July 5, 2002. (LBL Exhibits 59, 396, 397).

126. LBL passed all CORs that APG filed after April 4, 2002, on to the Owner. Some of these CORs were untimely and contained irregularities and incorrect information. (LBL FOF ¶ 52; Tr. 12/17/04 (Brais) p. 223).

127. After APG involved legal counsel in its challenge to the scope of its work on April 4, 2002, the Owner's representatives excluded APG from change order meetings. (Tr. 12/17/04 (Alibrando) p. 4; APG Exhibit 831). Although LBL sought thereafter to have APG included at change order meetings, the Owner's representatives excluded APG from these meetings. (APG Exhibit 831; Tr. 12/17/04 (Alibrando) p. 8).

2. Mediation

128. The Subcontract contains provisions that require the parties to attempt to mediate any claims before resorting to legal proceedings:

> 6.1 Mediation
>
> 6.1.1 Any claim arising out of or related to this Subcontract . . . shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party.
>
> 6.1.2 The parties shall endeavor to resolve their claims by mediation, which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Subcontract and the

> American Arbitration Association. The request may be made concurrently with the filing of a demand, [sic] mediation shall proceed in advance of legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

(See LBL Exhibit 13-B).

129. On May 14, 2002, APG filed a request for mediation with the American Arbitration Association ("AAA"). (LBL Exhibit 257-A). LBL responded to APG's request for mediation with the statement that "LBL does not believe that non-binding arbitration is a reasonable alternative at this time." (LBL Exhibit 257-A).

130. LBL filed its Complaint in this action on July 25, 2002, more than 60 days after APG filed its request for mediation on May 14, 2002.

131. APG did not file a motion to stay proceedings in this case pending mediation.

132. Wayne Lambert is a representative of Forcon International, a firm used by John Deere to assist in handling surety claims. Following LBL's notice of default to APG, Lambert communicated with APG, LBL, and Sentry concerning resolution of the parties' dispute. (Tr. 11/23/04 (Lambert) p. 84). In April, 2002, Lambert engaged James Robinson, identified supra, to assist Sentry with its evaluation of the dispute over APG's scope of work. (Tr. 11/23/04 (Lambert) p. 85). The parties met with Lambert and Robinson on May 2, 2002, to discuss the question whether the support steel was within APG's scope of work. (Tr. 11/23/04 (Lambert) pp. 86).

133. After additional conversations with the parties, Lambert suggested in May, 2002, that the parties engage the services of Donald Dobbins, a third-party neutral affiliated with the AAA, to estimate the cost of completing APG's work under the Subcontract and to opine as to the scope of APG's work under the Subcontract. (Tr. 11/23/04 (Lambert) p. 102; LBL Exhibit 248). APG agreed to have Dobbins perform an analysis of the cost to complete APG's work but

objected to asking him to opine on APG's scope of work under the Subcontract. (LBL Exhibit 258; Tr. 11/23/04 (Lambert) p. 197-98).

134. Dobbins performed an investigation of the cost to complete APG's work and issued his report on July 11, 2002. (Tr. 11/23/04 (Lambert) p. 120). The report did not address the dispute over APG's scope of work.

3. Termination

135. The part of the Subcontract governing termination of APG by LBL provides:

> 7.2.1 If the Subcontractor persistently or repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within three days after receipt of a written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may after three days following receipt by the Subcontractor of an additional written notice and without prejudice to any other remedy the Contractor may have, terminate the Subcontractor and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

(LBL Exhibit 13-B). This provision of the Subcontract sets forth the following procedure by which LBL could terminate APG:

(1) Provide APG with a first written notice of deficient work and direction to commence and continue correction "with diligence and promptness;"

(2) Provide APG with a second written notice of deficient work if APG failed within three days of receipt of the first notice to commence and continue to remedy the default; and,

(3) Provide notice of termination after three days following APG's receipt of the second written notice.

136. On April 16, 2002, LBL faxed to APG a document entitled "Three day Notice to Cure." (LBL Exhibit 88). In that document, LBL advised APG that LBL would not support APG's decision – as set forth in APG's April 4, 2002 letter – to stop support steel work in the FIS Soffit and the Recheck Bridge. LBL stated that it (1) considered APG's April 4, 2002 letter advising LBL of APG's decision to stop work at the FIS Soffit a breach of the Subcontract and (2) was holding APG in default. (LBL Exhibit 88). LBL also requested that APG confirm in writing, within three days, that it would continue its work. (LBL Exhibit 88).

137. The Court finds that because the support steel at issue was within APG's scope of work, APG's refusal to install the support steel in the disputed areas of the Project was a breach of the Subcontract.

138. On April 23, 2002, LBL sent a letter to John Deere informing it that LBL was considering declaring APG in default of the Subcontract. (LBL Exhibit 73). LBL stated that it was requesting and attempting to arrange a conference with APG and John Deere within fifteen days to discuss methods of performing the Subcontract. (LBL Exhibit 73).

139. Starting on or around May 6, 2002, APG reduced its workforce on the Project from fifty-seven to forty to nine persons. (LBL FOF ¶ 16; Tr. 11/15/04 (Alibrando) p. 86; Tr. 12/17/04 (Brais) pp. 126-27). Following APG's reduction in its workforce, the Owner sent a Notice to Cure to LBL on May 8, 2002, and a follow-up letter on May 9, 2002, in which the Owner stated that APG was not proceeding with insulated metal panel work and that APG had "failed to properly man the project." (LBL FOF ¶ 16, LBL Exhibit 478). In its May 9, 2002 letter, the Owner stated that APG had failed to provide any personnel for the May 8, 2002 night shift and that APG had also advised the Owner that APG planned a cutback in field labor as of May 9, 2002. (LBL Exhibit 478).

140. APG argued that it reduced its workforce in May, 2002 because of a lack of available work. Raymond Brais – a principal of LBL – and Alibrando both testified that there were numerous areas on the Project on which APG could have worked in May, 2002, but did not. (Tr. 12/17/04 (Alibrando) p. 3; Tr. 12/17/04 (Brais) pp. 246-48; APG Exhibit 3064; LBL FOF ¶¶ 58-59). Although LBL employed small crews of workers to perform APG's insulated metal panel work immediately after APG was terminated on June 27, 2002, that reduced manning of the Project was caused by APG's refusal to deliver the insulated metal panels and "tag drawings" required in order to complete APG's work. (LBL FOF ¶ 59; Tr. 12/17/04 (Alibrando) p. 119, (Brais) pp. 246-48).

141. On May 10, 2002, LBL sent a letter to Sentry and APG with a subject line heading of, "Second Notice of Contractor Default," and "APG Subcontract." (LBL Exhibit 74). This letter informed Sentry and APG of APG's failure to prosecute work on the Project. In the May 10, 2002 letter, LBL requested a conference with APG and Sentry within fifteen days of receipt of that letter. (LBL Exhibit 74). Conferences were held on May 14, 17, and 29, 2002, and did not result in resolution of the scope of work dispute or the problems created by APG's reduction in work force. (LBL Exhibit 68).

142. On June 18, 2002, US Airways issued a "Notification of Default" to LBL in which US Airways alleged that LBL had failed to proceed with the furnishing and installation of insulated metal panels in certain sectors of the Project. (LBL Exhibit 69).

143. On June 27, 2002, LBL served APG and Sentry with a "NOTICE OF DEFAULT AND TERMINATION," terminating APG under the Subcontract. (LBL Exhibit 68) (capitalization in original). On that date, LBL demanded that Sentry complete APG's work or indemnify LBL for the additional cost of competing APG's work as required under the Performance Bonds. (LBL

FOF ¶ 17; LBL Exhibit 68; LBL Exhibit 238). The Performance Bonds provided Sentry with the option of either arranging to complete APG's work, indemnifying LBL for the additional cost to complete APG's work, or denying coverage. (LBL Exhibit 238).

144. Sentry concluded that APG was not in default and consequently did not arrange for completion of APG's work on the Project or agree to indemnify LBL for completing APG's work. (LBL FOF ¶ 17; LBL Exhibits 272, 281, 287; Tr. 11/23/04 (Lambert) p. 228).

145. The Court finds that LBL's April 16, 2002 letter satisfied the first requirement of the Subcontract termination protocol that LBL provide APG with a first notice of default. The Court also finds that LBL's May 10, 2002 letter satisfied the second requirement of the Subcontract termination protocol that LBL provide APG with a second written notice of default after APG failed to commence and continue to remedy the default within three days of receipt of the first notice. Finally, the Court finds that LBL's June 27, 2002 "Notice of Default and Termination" satisfied the third requirement of the Subcontract termination protocol that LBL provide notice of termination to APG after three days following APG's receipt of LBL's second written notice.

146. Through the time of termination, APG had received $8,092,031 for work performed on the Project. (Jt. Stip. ¶ 22).

K. Global Settlement – Change Order 98

147. Change Order 98, dated November 20, 2002, and signed on December 23, 2002, is referred to as the "Global Settlement." (LBL Exhibit 83). Under Change Order 98, the Owner and LBL settled "all issues known to the parties as of August 27, 2002, except for future Owner elected scope changes . . ." (LBL Exhibit 83). Change Order 98 set forth equitable price adjustments that addressed all outstanding issues between LBL and the Owner, including CORs

that APG had submitted through August 27, 2002. (Tr. 11/12/04 (Wiseman) p. 34).

148. APG was not present at the June 24, 2002 meeting at which LBL and the Owner discussed the terms of Change Order 98. This meeting took place after the Owner had elected to exclude APG from change order meetings.

149. Under Change Order 98, LBL received $3,300,000 from the Owner in settlement of all of LBL's and APG's claims through August 27, 2002 as shown in Table 1 of the Global Settlement. (LBL Exhibit 83). Change Order 98 addressed APG's claims – passed on to the Owner by LBL – for support steel at the Recheck Bridge and for support steel throughout the other parts of the Project. (LBL Exhibit 83; Tr. 11/12/04 (Wiseman) p. 179).

150. The Owner concluded that APG's claims for the disputed support steel were without merit and accordingly no payments were made to LBL on behalf of APG for these claims. (LBL Exhibit 83; Tr. 11/12/04 (Wiseman) p. 27-29). The Owner evaluated APG's claims, as presented to it by LBL, as if those claims were LBL's claims. (LBL FOF ¶ 75; Tr. 11/12/04 (Wiseman) p. 28-29).

151. LBL's agreement to Change Order 98 required it to keep confidential any information related to that change order. (LBL Exhibit 83).

152. APG argued that it had submitted CORs in the amount of $12,500,978 prior to the time LBL agreed to the Global Settlement and that LBL had submitted CORs in the amount of $9,981,974 at the time of the Global Settlement. (APG FOF at p. 37; APG Exhibit 3756).

L. Summary of Key Findings

153. The support steel at issue was within APG's scope of work under the Subcontract.

154. APG's failure to furnish and install the disputed support steel was a breach of the

Subcontract.

155. The provision of the Prime Contract that required the Contractor, LBL, to continue to work in the event of a dispute with the Owner, US Airways, was incorporated into the Subcontract. APG was required to continue work on the Philadelphia Airport Project notwithstanding its disputes with LBL.

156. LBL's termination of APG complied with the termination provisions of the Subcontract.

IV. CONCLUSIONS OF LAW & DISCUSSION

A. Jurisdiction

Plaintiff LBL is a New York corporation with its principal place of business in New York. Defendant APG is a Pennsylvania corporation with its principal place of business in New Jersey. Defendant Sentry is an Illinois corporation with its principal place of business in Illinois. This Court has diversity jurisdiction over the claims presented in the Amended Complaint and APG's counterclaims against LBL pursuant to 28 U.S.C. § 1332.

APG impleaded LBL's sureties, XL – an Illinois corporation with its principal place of business in Illinois – and NAC – a Connecticut corporation with its principal place of business in Connecticut – as third-party defendants. While XL and Sentry are both citizens of Illinois, the addition of XL as a third-party defendant does not divest the Court of its previously acquired diversity jurisdiction. See 6 Charles Alan Wright, et al., Federal Practice and Procedure § 1444, at 321-22 (2d ed. 1990).

A federal court exercising diversity jurisdiction applies the substantive law of the state in which it sits, McKenna v. Pacific Rail Service, 32 F.3d 820, 825 (3d Cir. 1994), in this case, Pennsylvania law.

B. Construction of the Subcontract – Scope of APG's Work

The interpretation of a contract is a question of law. Halpin v. LaSalle University, 639 A.2d 37, 39 (Pa. Super. Ct. 1994). If the court deems a contract ambiguous, it may consider extrinsic evidence in interpreting the terms of the contract. Jules Jurgensen/Rhapsody, Inc. v. Rolex Watch U.S.A., Inc., 716 F. Supp. 195, 197 (E.D. Pa. 1989) (citing Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1011 (3d Cir. 1980)).

The dispute in this case centers on APG's scope of work, which is defined by Article 2.1(A)(1) of the Proposal Form. Article 2.1(A)(1) provides:

> Include all necessary structural steel and miscellaneous iron support members, tubes, clips, shapes, rods, cables, hardware, fasteners, etc. to support the work. The structural steel sized and indicated on the structural steel drawings will be furnished and installed by the steel fabricator. Those items not shown, not sized, or indicated not to be by the steel fabricator are to be designed, engineered, fabricated, furnished and installed as the support system for the curtainwall, metal panel, skylight, and louver Contractor.

Pursuant to Article 2.1(A)(1), steel that was "sized and indicated" on the structural steel drawings was to be furnished and installed by Cives. Steel that was "not shown, not sized, or indicated not to be by the steel fabricator [Cives]," was to be "designed, engineered, fabricated, furnished and installed" by LBL and APG.

The phrase "sized or indicated" is of singular importance in this case. Thus, it is unfortunate that it is also ambiguous. As a result, the Court must look to the extrinsic evidence offered by the parties at trial to interpret the meaning of this phrase. Jules Jergensen/Rhapsody, 716 F. Supp. at 197. This evidence leads to the conclusion that the support steel for APG's insulated metal panel system was within APG's scope of work under the Subcontract.

First, the structural engineer responsible for preparation of the structural steel drawings on which APG based its bid testified that the notations pertaining to the support steel shown in those drawings did not describe support steel that is sized. The Court places particular weight on the structural engineer's testimony concerning the structural steel drawings. C.f. Vergason Tech. v. Masco Corp., 146 F. Supp. 2d 465, 476 (D. Del. 2001) (crediting testimony of inventor over that of defense expert when construing inventor's own patent claims). Second, the structural engineer responsible for APG's shop drawings and the Project architect both testified that the

support steel for the metal panels depicted on the structural steel drawings was not sized. That the steel called for on the structural steel drawings was not sized and accordingly left to APG to design and construct is also supported by the structural engineer's decision to issue drawings that were intentionally incomplete, thereby requiring the contractors to execute the final design.

Furthermore, APG's conduct throughout the Project leads to the conclusion that APG considered the support steel to be within its scope of work. Under Pennsylvania law, the conduct of contracting parties following the formation of a written contract is "perhaps the strongest indication of what the writing means." Atlantic Richfield Co. v. Razumic, 390 A.2d 736, 741 (Pa. 1978), citing Restatement (Second) of Contracts § 228. As Comment (g) to Section 228 of the Restatement (Second) states, "the parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning." See also Commonwealth ex rel. Flemming v. Flemming, 432 A.2d 626, 628 (Pa. Super. Ct. 1981) ("the construction given to a contract by the parties thereto, as manifested by their actions after agreeing to its terms, and particularly by those actions prior to the commencement of litigation, is entitled to great weight.").

APG failed to object to the inclusion of support steel in W&S's 1999 shop drawings for APG's work. The fact that the W&S shop drawings called out items to be installed by entities other than APG with a "by others" notation is strong evidence that the support steel, which was not called out as "by others," was to be installed by APG. APG's argument that W&S erroneously included support steel on the shop drawings is undercut by the fact that APG had used W&S on approximately twenty projects prior to the Philadelphia Airport Project and never objected to the W&S shop drawings for the Project.

APG's work schedules also support the finding that the support steel was within APG's scope of work. First, APG's work schedule of September 11, 2000, establishes that as of that date – before the alleged October 30, 2000, "directive" from LBL – APG planned to install support steel throughout the Project. Second, the October 30, 2000 "directive" from LBL had no effect on APG's work schedule – APG's post-"directive" March 13, 2001 work schedule was essentially identical to the September 11, 2000 work schedule. The evidence of APG's work schedules before and after the alleged October 30, 2000 "directive" demonstrates APG's intent to install the support steel on the project. See Service Technicians, Inc. v. United States, 37 Fed. Cl. 383, 386 (1997) (plaintiff's statements made contemporaneously with contract performance rebutted plaintiff's subsequent claim that it had performed work outside of contract scope).

Furthermore, APG designed an aluminum supergrid for the FIS Soffit to minimize material costs and also notched the tube steel at the Sector 1 Pier to avoid interference with structural steel at that location. That APG took responsibility for engineering the support steel at these areas also supports the conclusion that APG was responsible for the disputed support steel.

Upon consideration of all of the evidence presented at trial, the Court finds that the support steel at issue was within the scope of APG's work under the Subcontract.

C. APG's Obligation to Continue Work Despite Scope Dispute

APG argues that it was justified in reducing its workforce on the Project because it was owned millions of dollars in unprocessed CORs and was being financially "choked" by LBL's failure to process these CORs. According to APG, the Subcontract did not obligate it to continue work on the Project while it was owed that much money and its scope of work was in dispute. The Court rejects APG's argument and concludes that APG was obligated to continue work on the Project regardless of its disputes with LBL over the scope of APG's work.

Paragraph 19.14 of the Prime Contract provides that, "in the event of any dispute between the Owner and the Contractor, the Contractor shall expeditiously proceed with the performance of the Work." Paragraph 2.1 of the Subcontract provides:

> The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions [of] the U.S. Airways General Conditions apply to this Agreement pursuant to Paragraph 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect . . . Where a provision of such documents [the Prime Contract] is inconsistent with a provision of this Agreement, this Agreement shall govern.

APG argues that the wording ". . . to the extent that . . . provisions of the Prime Contract apply to the Work of the Subcontractor . . . ," in paragraph 2.1 of the Subcontract incorporates provisions of the Prime Contract into the Subcontract only insofar as the Prime Contract addresses the actual work of the Contractor, LBL, but not with respect to the Prime Contract's treatment of disputes between the Owner and Contractor. The Court disagrees with APG's interpretation of this clause and concludes that paragraph 19.14 of the Prime Contract was incorporated into the Subcontract.

The language of paragraph 2.1 of the Subcontract expressly incorporates the provisions of the Prime Contract into the Subcontract so long as those Prime Contract provisions are not inconsistent with the Subcontract. There are no provisions of the Subcontract that are inconsistent with paragraph 19.14 of the Prime Contract. See APAC-Tennessee, Inc. v. J.M. Humphries Constr. Co., 732 S.W.2d 601, 605 (Tenn. Ct. App. 1986) (declining to incorporate payment provision of prime contract into subcontract where prime contract called for different payment than did subcontract). In addition, APG agreed to strike paragraph 4.7.1 – which covered APG's right to stop work for LBL's failure to pay – from the Subcontract. APG's

agreement to strike paragraph 4.7.1 from the Subcontract evidences its willingness to relinquish the right to stop work in the event of non-payment. Moreover, even if the Subcontract is read as silent on the issue of APG's continued work in the face of a dispute with LBL, such silence does not preclude incorporation of the continue-to-work provision in the Prime Contract. Maxum Foundations, Inc. v. Salus Corp., 779 F.2d 974, 980 (4th Cir. 1985).

Lastly, the Court notes that if paragraph 19.14 of the Prime Contract were not incorporated into the Subcontract, LBL would be in a position where APG could cease work in the event of a dispute with LBL, forcing LBL to perform APG's work to avoid being held in default by the Owner because LBL could not cease work in the event of a dispute between it and the Owner. The Court finds that the parties did not intend that result.

APG argues that even if paragraph 19.14 of the Prime Contract is incorporated into the Subcontract, APG was under no obligation to perform disputed work on the ground that it was owed millions of dollars by LBL. The Court rejects this argument on the ground that contracts that require a contractor to proceed diligently in performing its work, even where it may be prejudiced by an owner's behavior, are enforceable. See Recon/Optical, Inc. v. Government of Israel, 816 F.2d 854 (2d Cir. 1987) ("proceed diligently" provision obligated contractor to continue its performance even though owner might subsequently be found in breach for failure to pay for changes in work).[5]

For the foregoing reasons, the Court concludes that paragraph 19.14 of the Prime Contract was incorporated into the Subcontract and that this paragraph is enforceable. Although

[5] The authority cited by APG is distinguishable from this case. While the court in Chester County School Authority v. Aberthaw Construction Company, 333 A.2d 758 (Pa. 1975), held that a contractor was not required to prosecute work that it disputed with the project owner, that holding in that case turned on the application of a Pennsylvania statute that would have precluded any recovery by the subcontractor had the subcontractor performed the work and later sued for payment. This case involves no such statute.

APG may have believed that the money it was allegedly owed by LBL justified reducing its workforce on the Project from fifty-seven to forty to nine persons in May, 2002, after raising the support steel issue, APG was contractually obligated to continue work on the Project notwithstanding its disputes with LBL.

D. Breach of the Subcontract

Having concluded, supra, that APG's scope of work under the Subcontract included supplying and installing the support steel at issue, the Court must determine whether APG's failure to supply and install the support steel was a breach of the Subcontract. In Pennsylvania, "[w]hen performance of a duty under a contract is due, any nonperformance is a breach." Widmer Engineering, Inc. v. Dufalla, 837 A.2d 459, 467 (Pa. Super. Ct. 2003) (emphasis added). As discussed supra, APG refused to supply and install support steel that was within its scope of work under the Subcontract and reduced its work force on the Project. The Court concludes that APG's actions were a breach of the Subcontract. Id.

The Court next determines whether APG's breach of the Subcontract was material. In Pennsylvania, a material breach by one party to a contract entitles the non-breaching party to suspend performance. Widmer, 837 A.2d at 467 (citing Berkowitz v. Mayflower Securities, Inc., 317 A.2d 584, 586 (Pa. 1974)). In determining the materiality of a breach of contract, Pennsylvania courts consider the following factors: (1) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (2) the extent to which the injured party can be adequately compensated for that part of the benefit of which he will be deprived; (3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (4) the likelihood that the party failing to perform or offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and (5) the extent to which

the behavior of the party failing to perform or offer to perform comports with standards of good faith and fair dealing. Widmer, 837 A.2d at 467 (citing Restatement (Second) of Contracts § 241 (1981)).

The Court concludes that APG's breach of the Subcontract was material. APG's failure to prosecute work within its scope deprived LBL of the benefit it expected from APG, and LBL could be compensated for its loss by the award of damages. Moreover, APG did not evidence an intent to cure its failure to perform and never cured its failure to perform. These Widmer factors are the basis of the Court's determination that APG's breach of the Subcontract was material. See Oak Ridge Const. Co. v. Tolley, 504 A.2d 1343 (Pa. Super. Ct. 1985).

E. LBL's Compliance With the Termination Provisions of the Subcontract

LBL takes the position that its termination of APG under the Subcontract complied with the terms of the Subcontract and is therefore valid. APG argues that LBL failed to follow the termination protocol set forth in the Subcontract and that LBL's failure to follow this protocol constituted a breach of the Subcontract. The Court disagrees with APG and concludes that LBL complied in all respects with the termination provisions of the Subcontract.

Under Pennsylvania law, notice to terminate a contract must be "clear and unambiguous." Eastern Milk Producers Co-op Assn. v. Lehigh Valley Co-op Farmers, 568 F. Supp. 1205, 1207 (E.D. Pa. 1983) (citing Maloney v. Madrid Motor Corp., 122 A.2d 694, 696 (Pa. 1956)). A mere threat of possible termination in the future does not constitute clear and unambiguous notice. Accu-Weather, Inc. v. Prospect Comms., 644 A.2d 1251, 1255 (Pa. 1994). Conditions precedent to a contract termination must be strictly fulfilled. Id. at 1254.

Paragraph 7.2.1 of the Subcontract, which governs the procedure by which LBL could terminate APG, provides:

> If the Subcontractor persistently or repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within three days after receipt of a written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may after three days following receipt by the Subcontractor of an additional written notice and without prejudice to any other remedy the Contractor may have, terminate the Subcontractor and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

On April 16, 2002, LBL sent APG a three-day notice to cure. This letter stated, inter alia, that APG had failed to prosecute work at the Recheck Bridge and at the FIS Soffit. The Court concludes that this letter satisfied the first-notice requirement set forth in paragraph 7.2.1 of the Subcontract.

On May 10, 2002, LBL sent a letter to Sentry and APG with a subject line heading, "Second Notice of Contractor Default," and "APG Subcontract." This letter informed Sentry and APG of APG's failure to prosecute work on the Project and constitutes written notice to APG and Sentry that APG was not prosecuting work at the Project as required by the Subcontract. The May 10, 2002 letter also refers to a May 9, 2002 notice to cure from US Airways to LBL's surety – attached to the May 10, 2002 letter – that contains specific references to the insulated metal panel work that APG failed to perform. Accordingly, the Court concludes that the May 10, 2002, letter from LBL to APG and Sentry satisfied the second notice of termination requirement of paragraph 7.2.1 of the Subcontract. E.g., Thomas H. Ross, Inc. v. Seigfreid, 592 A.2d 1353, 1357 (Pa. Super. Ct. 1991) (informal notice of intent to default sufficient where contractor had received prior notice of his defective performance); Composite Laminates, Inc. v. United States, 27 Fed. Cl. 310, 318 (1992) (notice of cure sufficient where record demonstrated that contractor had prior notice of asserted defects); see also Clark Const. Group Inc. v. Allglass Systems, Inc.,

2004 WL 1778862, at *8 (D. Md. Aug. 6, 2004) (reference to contractor's default in subject line of letter sufficient notice of default).

Finally, on June 27, 2002, LBL sent to APG and Sentry a letter entitled "NOTICE OF DEFAULT AND TERMINATION" informing APG that LBL was formally terminating APG's right to complete the Subcontract. The June 27, 2002, letter makes reference to the Subcontract in its subject line heading as well as in the text of the letter. The Court concludes that the June 27, 2002 letter satisfied the requirement of the Subcontract that LBL allow at least three days to pass after APG received LBL's second notice of default, dated May 10, 2002, before terminating APG. See Composite Laminates, Inc., 27 Fed. Cl. at 318.

The Court rejects APG's argument that LBL's failure to act with urgency in terminating APG rendered the termination ineffective. Paragraph 7.2.1 of the Subcontract states that the Contractor may terminate the Subcontract "after three days following receipt of the Subcontractor of an additional written notice." (emphasis added). This language does not obligate LBL to terminate the Subcontract precisely at the end of the third day after APG received LBL's second written notice. E.g., Halifax Engineering, Inc. v. United States, 915 F.2d 689, 691 (Fed. Cir. 1990).

APG's additional argument that LBL's pre-termination conduct was inconsistent with an intent to terminate is also rejected. Pursuant to paragraph 3.1 of the Performance Bonds, Sentry's obligations under the bonds would arise only if LBL first attempted to arrange a conference with APG and Sentry Select within fifteen days after APG and Sentry were notified that LBL was considering holding APG in default. Accordingly, after issuing the first notice to cure to APG on April 16, 2002, LBL contacted John Deere – the predecessor to Sentry – and APG on April 23, 2002, informing them that LBL was considering declaring APG in default and requesting a

conference to discuss performance of the Subcontract. Thus, LBL's action in entering into discussions with APG and Sentry was necessary to trigger Sentry's liability under the Performance Bonds and does not demonstrate that LBL abrogated its position that APG's failure to prosecute work within its scope was a breach of the Subcontract.[6] See International Hobby Corp. v. Rivarossi S.p.A., 1998 U.S. Dist. LEXIS 9932, at *18-19 (E.D. Pa. June 30, 1998).

F. Mediation as Condition Precedent to Legal Action

The Subcontract required the parties to endeavor to mediate any claims before resorting to legal proceedings as follows:

> 6.1.1 Any claim arising out of or related to this Subcontract . . . shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party.
>
> 6.1.2 The parties shall endeavor to resolve their claims by mediation, which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Subcontract and the American Arbitration Association. The request may be made concurrently with the filing of a demand, [sic] mediation shall proceed in advance of legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

After challenging the scope of its work under the Subcontract on April 4, 2002, APG filed a request for mediation with the AAA on May 14, 2002. LBL responded to that request by taking the position that non-binding arbitration was not a reasonable alternative at that time.[7]

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[6] LBL argues that APG's material breach of the Subcontract excused LBL's compliance with the termination protocol set forth in the Subcontract, but fails to cite any cases on that specific issue. The Court has not found a Pennsylvania case that decides this narrow issue but notes that the United States District Court for the District of Iowa and the Georgia Court of Appeals have noted – without deciding – that a party's material breach of a contract could excuse the non-breaching party's compliance with the contract's termination protocol. Maytag Corp. v. United States Pac. Corp., 2004 U.S. Dist. LEXIS 8967, at *7-8 (D. Iowa May 10, 2004); Lager's LLC v. Palace Laundry, Inc., 543 S.E.2d 773, 776 (Ga. App. 2000).

[7] LBL appears to have mistakenly referred to non-binding arbitration instead of mediation.

APG contends that LBL's failure to mediate the parties' dispute before filing the instant action is in violation of the Subcontract. The Court need not decide this issue in view of its conclusion that APG waived its right to mediation.

1. APG Waived its Right to Mediation

LBL argues that APG's failure to request a stay from the Court pending mediation and active participation in the litigation constitute a waiver by APG of any right it had to require that LBL mediate the parties' dispute. The Court agrees with LBL.

The provision of the Subcontract that governs the initiation of legal proceedings between APG and LBL states that the parties are to, "endeavor to resolve their claims by mediation . . . mediation shall proceed in advance of legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing [of a demand for mediation]." The effect of this provision is that a demand for mediation stays any legal or equitable proceedings for 60 days.

Pennsylvania courts have held that waiver of an alternative dispute resolution provision in a contract requires actions that are inconsistent with the contract's dispute resolution procedures and that result in prejudice to the opposing party. See Goral v. Fox Ridge, Inc., 683 A.2d 931, 933 (Pa. Super. Ct. 1996). "[A] party may waive its right to have its dispute settled by nonjudicial means by availing itself of the judicial process to resolve the dispute." A.T. Chadwick Co., Inc. v. PFI Constr. Corp., 2004 WL 2451372, at *3 (Pa. Com. Pl. Ct. July 27, 2004). A party that engages in discovery and files pretrial motions waives a contract's alternative dispute resolution provision. St. Clair Area School Dist. Bd. of Ed. v. E.I. Associates., 733 A.2d 677, 682 n. 6 (Pa. Commw. Ct. 1999); Moscatiello Const. Co. v. Pittsburgh Water and Sewer Auth., 648 A.2d 1249, 1251 (Pa. Commw. Ct. 1994); c.f. Tunnell-

Spangler & Assoc., Inc. v. Katz, 2003 WL 23168817, at *3 (Pa. Com. Pl. Ct. Dec. 31, 2003) (construing mediation clause identical to that in LBL-APG Subcontract); see also Zack Assoc. v. Setauket Fire Dist., 783 N.Y.S. 2d 827, 827 (N.Y. App. Div. 2004) (defendant's participation in litigation constituted waiver of right to alternative dispute resolution of contract claims); Smith v. IMG Worldwide, Inc., 360 F. Supp. 2d 681, 687 (E.D. Pa. 2005) (engaging in motion practice and providing "substantial discovery" constituted waiver of contractual alternative dispute resolution provision).

In this case, APG availed itself of the judicial process and acted in a manner inconsistent with the intent to enforce the mediation provision in the Subcontract. APG and Sentry did not file a motion to stay proceedings pending mediation and instead filed counterclaims against LBL, impleaded XL and NAC, filed several pretrial motions – including, inter alia, a motion for partial summary judgment and a motion in limine – and proceeded to trial. See Tunnell-Spangler, 2003 WL 23168817, at *3; Goral, 683 A.2d at 933. Accordingly, the Court concludes that APG waived any right to mediation and that this waiver excused any failure by LBL to comply with the Subcontract by attempting mediation with APG before filing the instant action.

2. Involvement of Donald Dobbins and "Standstill" Provision of Subcontract

LBL takes the position that the parties' engagement of the AAA neutral Donald Dobbins to investigate LBL's cost to complete the Philadelphia Airport Project satisfied the Subcontract's requirement that the parties attempt to mediate their dispute before the initiation of legal action. LBL also argues that because the effect of paragraph 6.1.2 of the Subcontract is to stay legal proceedings for 60 days from the date that a demand for mediation was filed, LBL's filing of its initial Complaint on July 25, 2002 was proper because LBL filed that Complaint more than 60 days after APG filed a request for mediation with the AAA on May 14, 2002.

As discussed supra, the Court concludes that APG by its conduct waived any contractual right to mediation. Accordingly, the Court does not consider these arguments advanced by LBL.

G. Payment and COR Obligations

1. Condition Precedent to Payment – Funds Agreement

APG argues that the Funds Agreement does not insulate LBL from having to pay APG for work APG performed on the Project. The Court rejects this argument.

First, LBL had no responsibility for ensuring that funds designated for APG were actually disbursed to APG while the Funds Agreement was in place. Under the Funds Agreement, incorporated by Change Order 2 into the Subcontract on October 17, 2000, LBL and APG agreed to have a third party, the Funds Administrator, assume responsibility for receiving all payments for APG and LBL directly from US Airways and disbursing those payments to LBL and APG. After the Funds agreement was in place, LBL received no funds that US Airways had earmarked for payment to APG. The Court concludes that LBL and APG are bound by the Funds Agreement and that APG cannot seek payment from LBL for payment applications and CORs properly submitted by LBL to the Funds Administrator. See Schenley Farms Co. v. Allegheny County, 37 A.2d 554, 557 (Pa. 1944) ("it is well settled that when it is the agreement of the parties that plaintiff shall look to a particular fund alone, and not to the personal responsibility of defendant, neither law nor equity can change the agreement.").

Furthermore, the Funds Agreement conditioned disbursal of payments from the Funds Administrator to LBL and APG on the Funds Adminstrator's receipt of those funds. Paragraph 5.2.0 of the Funds Agreement provides:

> 5.2.0 Disbursements are anticipated twice monthly. However, disbursement will be processed as funds are received.

Under that provision, payment to APG was conditioned on the receipt of funds by the Funds Administrator.

Pennsylvania courts construe contract clauses that condition payment to a subcontractor on the contractor's receipt of funds from the owner of the project as "pay-if-paid" clauses that do not require the contractor to pay a subcontractor until the contractor has received those funds from the owner of the project. E.g. C.M. Eichenlaub Co. v. Fidelity & Deposit Co., 437 A.2d 965, 967 (Pa. Super. Ct. 1981); Cumberland Bridge Co. v. Lastooka, 8 Pa. D. & C.3d 475, 482 (1977). On the other hand, "pay-when-paid" clauses merely create a timing mechanism for a contractor's payments to a subcontractor and do not condition payments to a subcontractor on the contractor's receipt of those payments from the project owner. E.g., United Plate Glass Co. v. Metal Trims Indus., Inc., 525 A.2d 468 (Pa. Super. Ct. 1987). Pay-if-paid clauses are not void under Pennsylvania law. See Earthdata Int'l of N.C., L.L.C. v. STV Inc., 159 F. Supp. 2d 844, 847 (E.D. Pa. 2001).

A pay-if-paid condition generally requires words such as "condition," "if and only if," or "unless and until" that convey the parties' intention that a payment to a subcontractor is contingent on the contractor's receipt of those funds. Id.; C.M. Eichenlaub Co., 437 A.2d at 967 (contractor not obligated to pay subcontractor "unless and until" contractor received payment from project owner). Courts construe clauses describing a contractor's payment obligations to a subcontractor as pay-if-paid clauses where the contractual language and other surrounding circumstances point to its existence. Id.

The Restatement is also instructive:

In resolving doubts as to whether an event is made a condition of an obligor's duty, and as

> to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.

Restatement (Second) of Contracts § 227 (emphasis added).

The Court concludes that the provision of the Funds Agreement that conditions payment to APG on the Funds Administrator's receipt of funds from US Airways – "disbursements [to APG and LBL] will be processed as funds are received" – is a pay-if-paid clause. Under this provision, APG would not be entitled to receive payment unless funds were received by the Funds Administrator. Because payments to APG were conditioned on the receipt of those funds by the Funds Administrator, the Court concludes that LBL is not liable to APG for nonpayment.

2. APG is Bound by the US Airways' Valuation of its CORs

APG argues that it is not bound by any determinations made by US Airways with respect to the value of CORs submitted by APG. The Court disagrees and concludes that US Airways retained the ultimate authority over the valuation of CORs submitted by APG.

The provisions of the Prime Contract and Subcontract lead the Court to conclude that US Airways' valuation of CORs submitted to it for review was final. Paragraph 19.16 of the Prime Contract states that any approval of a payment to a contractor on the Project is subject to the "review and approval" of US Airways. This provision thus grants US Airways final authorization over any payments made to contractors on the Project.

As with paragraph 19.14 of the Prime Contract, see supra, there is no provision in the Subcontract that is inconsistent with paragraph 19.16 of the Prime Contract. The Court thus concludes that paragraph 19.16 of the Prime Contract was incorporated into the Subcontract. Under paragraph 19.16 of the Prime Contract, US Airways had final authority over any payments made to APG and APG was therefore bound by US Airways' valuation of those CORs.

3. LBL Is Liable to APG for CORs Not Presented to Owner

Although the Funds Agreement, as discussed supra, divests LBL of the responsibility to disburse funds to APG while it was in place, the Funds Agreement does not insulate LBL from all liability. Paragraph 5.1.0 of the Funds Agreement does not authorize the release of payment to APG until LBL provides the Funds Administrator with an approved pay request. Thus, failure by LBL to present APG's CORs to the Owner would prevent APG from obtaining payment. LBL may not, therefore, avoid liability to APG for any failure to pass CORs on to the Owner on the ground that LBL never received funds from the Owner in connection with those CORs. McDermott v. Party City Corp., 11 F. Supp. 2d 612, 621 (E.D. Pa. 1998) ("[a] party may not . . . take advantage of an insurmountable obstacle placed by himself in the path of another party's adherence to the agreement.") (citations omitted).

The Court concludes that LBL is liable to APG to the extent that it failed to pass any of APG's CORs on to the Owner and the CORs are determined to be meritorious. The Court defers decision on whether there was any such failure by LBL.

4. Payments Received by LBL After APG's Termination

LBL admits in its post-trial submissions that after APG's termination, LBL "receive[d] some payments from US Airways that were attributable to claims made by APG and passed through to US Airways." These payments include funds LBL received in connection with the Global Settlement (Change Order 98) that were allocable to APG.

As discussed supra, the Funds Agreement insulated LBL from responsibility for disbursing payment to APG. However, to the extent that LBL received funds from the Owner for work performed by APG, LBL was required to disburse that money to APG. The Court

accordingly concludes that LBL's damages may be reduced by payments LBL received under the Global Settlement that were allocable to APG.

H. APG's CASPA Claim

APG seeks interest, penalties, and attorney fees from LBL, XL, and NAC pursuant to CASPA, 73 P.S. § 501 et seq.[8] APG argues that it is entitled to this recovery on the ground that LBL wrongfully withheld payment due to APG for labor and materials provided on the Philadelphia Airport Project. In response, LBL argues that the plain language of the CASPA statute precludes APG's CASPA claims.

1. The CASPA Statute

Under CASPA,"performance by a . . . subcontractor in accordance with the provisions of a contract shall entitle the ... subcontractor to payment from the party with whom the ... Subcontractor has contracted." 73 P.S. § 504. CASPA requires that once a subcontractor has performed in accordance with his contract, the contractor must pay the subcontractor "the full or proportional amount received for [the] subcontractor's work and materials, based on work completed or services provided under the subcontract," either: (1) "14 days after receipt of each progress or final payment [from the owner];" or (2) "14 days after receipt of the subcontractor's invoice, whichever is later." 73 P.S. § 507(c). Payments delayed beyond the date specified in § 507(c) are subject to interest of one percent per month. 73 P.S. § 507(d).

Payment must be made by a contractor to their subcontractors unless it is withheld on a

[8]The Pennsylvania Supreme Court has not yet interpreted CASPA. Accordingly, the Court must predict how the Pennsylvania Supreme Court would interpret the statute. Borman v. Raymark Indus., Inc., 960 F.2d 327, 331 (3d Cir. 1992).

good-faith belief that a subcontractor is responsible for a deficiency item.[9] 73 P.S. § 511. However, a contractor that withholds payment based on such a good-faith belief must notify the subcontractor of the reason for the withheld payment within seven days of receiving notice of the deficient work. 73 P.S. § 511(b).

A subcontractor may bring suit if the contractor violates CASPA, and may recover from the contractor additional penalty interest of one percent per month of the amount wrongfully withheld. 73 P.S. § 512. In addition, "[t]he substantially prevailing party in any proceeding to recover any payment ... shall be awarded a reasonable attorney fee." 73 P.S. § 512; see generally ILM Systems, Inc. v. Suffolk Const. Co., Inc., 252 F. Supp. 2d 151, at 161-62 (E.D. Pa. 2002).

2. Analysis

a. LBL's Liability Under CASPA for Funds Received While Funds Agreement was in Effect

LBL argues that under § 507 of CASPA, it cannot be responsible for fees earmarked for APG's work while APG was on the job and when the Funds Agreement was in effect because LBL never received payment from the Funds Administrator to be passed on to APG. APG argues in its post-trial submissions (1) that numerous other jurisdictions hold pay-if-paid provisions in contracts void as a matter of public policy and (2) that because CASPA exists to protect subcontractors from non-payment, the Court should not permit LBL to escape liability for failure to pay APG for work that APG had performed.

Under the Subcontract and the Funds Agreement, LBL was not obligated to pay APG for

[9]A deficiency item is "[w]ork performed but which the owner, the contractor, or the inspector will not certify as being completed according to the specifications of a construction contract." 73 P.S. § 502.

APG's work unless LBL received funds from the Owner or Funds Administrator for that work. The circumstances of this case compel the conclusion that LBL cannot be liable to APG under CASPA for work performed by APG while the Funds Agreement was in place. The Funds Agreement provides that with respect to payments made to APG and LBL, "disbursements will be processed as funds are received," which the Court concludes is an enforceable pay-if-paid provision. The Court finds that the Funds Agreement evidences APG's intent to ensure that the third party Funds Administrator – and not LBL – was responsible for disbursing payments to APG.

Based on the language of § 507 of CASPA and APG's assent to the Funds Agreement, the Court determines that, for purposes of APG's CASPA claim, LBL was not obligated to pay APG unless LBL received money allocable to APG from the Funds Administrator (or the Owner). See Joseph F. Cappelli & Sons v. Keystone Custom Homes, 815 A.2d 643, 645 (Pa. Super. Ct. 2003).

b. LBL's Liability under CASPA for Payments Received by LBL After APG's Termination and After Funds Agreement Was No Longer in Effect

As discussed, LBL received some payments from US Airways that were attributable to claims made by APG and passed through to US Airways after APG's termination. These payments include payments received in connection with the Global Settlement, Change Order 98. LBL argues that these payments are not subject to CASPA on the ground that § 511 of CASPA entitled LBL to withhold them from APG based on LBL's own good-faith belief that APG's work was deficient. The Court finds that LBL had a right to withhold such payments under the facts of this case.

The language of Section 507(a) of CASPA states, "[p]erformance by a subcontractor in accordance with the provisions of the contract shall entitle the subcontractor to payment from the party with whom the subcontractor has contracted." 73 P.S. § 507(a). However, CASPA does not address the issue whether payments earmarked for a subcontractor that are received by a contractor after a subcontract is terminated are subject to the statute. This issue has not been briefed and, accordingly, the Court will not decide it.

c. XL and NAC Liability Under CASPA

"[T]he plain meaning of the sections of [CASPA] is that a subcontractor may seek penalty payments and attorneys' fees against a contractor according to the provisions of their subcontract agreement . . . [T]he plain meaning of the sections of [CASPA] does not address, or provide for, the recovery of such damages against a surety." R.W. Sidley, Inc. v. United States Fid. & Guar. Co., 319 F. Supp. 2d 559, 561 (W.D. Pa. 2004) (emphasis added). Thus, subcontractors, such as APG, may not recover CASPA penalty payments or attorney fees from sureties, such as XL and NAC. Accordingly, the Court concludes that XL and NAC are not liable to APG for CASPA penalties or attorney fees.

I. APG's Unjust Enrichment Claim

APG asserts that it is entitled to compensation from LBL under an unjust enrichment theory for the work that APG performed on the Project. This theory of recovery is unavailable to APG as a matter of law.

In Pennsylvania, recovery under unjust enrichment is not available where the relationship between the parties is based on a written agreement. Curley v. Allstate Ins. Co., 289 F. Supp. 2d 614, 619-20 (E.D. Pa. 2003) (citing Schott v. Westinghouse Elec. Corp., 259 A.2d 443, 448 (Pa.

1969)). Accordingly, the existence of the Subcontract between the parties precludes APG's unjust enrichment claim against LBL.

J. APG's Quantum Meruit Claim

APG argues that because it conferred valuable goods and services upon LBL and that LBL accepted and enjoyed these goods, APG is entitled to recover from LBL under the theory of quantum meruit. This theory of recovery is unavailable to APG.

As with claims grounded in unjust enrichment, claims grounded in quantum meruit are precluded when the relationship between the parties is founded on a written agreement or express contract. Promark Realty Group, Inc. v. B&W Associates, 2002 WL 862566, at *4 (E.D. Pa. May 1, 2002) (citations omitted). In this case, APG's and LBL's relationship was founded on the written Subcontact, and APG's quantum meruit claim for recovery against LBL is accordingly precluded. Id.[10]

K. Damages

The Court reserves ruling on the damages in this case and does not at this time make any rulings regarding any of the CORs at issue. The Court observes that in light of the conclusion that the support steel was within APG's scope of work, LBL is entitled to recover its cost of completing APG's work. See In re Cornell & Co., 229 B.R. 97, 112 (Bankr. E.D. Pa. 1999) ("[t]he measure of [the] owner's damages for a construction contractor's breach is the cost of completing the contract or correcting the defective work, minus the unpaid part of the contract

[10]Even if not precluded by the existence of the written Subcontract, APG's unjust enrichment and quantum meruit claims against LBL would fail because the disputed support steel was within APG's scope of work under the Subcontract. See Allied Fire, 972 F. Supp. at 935 (rejecting subcontractor's quasi-contract claims where disputed work was within subcontractor's scope of work under subcontract).

price.") (citing 41 A.L.R. 4th 131 § 15 (1985)). These damages may be reduced by funds received by LBL, both before and after APG was terminated, for work performed by APG.

L. Recovery Under Performance and Payment Bonds

The Court reserves ruling on the amount of any recovery under the Performance and Payment Bonds.

V. CONCLUSION

For all of the foregoing reasons, the Court concludes that the support steel at issue was within APG's scope of work as set forth in the Subcontract and that APG's failure to furnish and install this support steel was a material breach of the Subcontract. The Court also concludes that the incorporation of paragraph 19.14 of the Prime Contract into the Subcontract required that APG continue to work regardless of its disputes with LBL. Finally, the Court concludes that LBL's termination of APG complied with the termination provisions of the Subcontract.

LBL may recover its cost of completing APG's work under the Subcontract, but this recovery may be reduced by any funds that LBL received for work performed by APG, both before and after termination, and by any APG CORs or payment applications determined to be meritorious that LBL failed to pass on to US Airways.

LBL is not liable to APG for funds earmarked for APG and paid to the Funds Administrator and for APG's CORs rejected by US Airways. To that extent, APG's CASPA claim against LBL is denied.

The Court defers ruling on the damages claimed by LBL and APG and the extent of liability of the sureties, Sentry, XL, and NAC, under the Payment and Performance Bonds.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LBL SKYSYSTEMS (USA), INC.	:	**CIVIL ACTION**
Plaintiff/	:	
Defendant on Counterclaim,	:	
	:	
v.	:	
	:	
APG-AMERICA, INC., and	:	
SENTRY SELECT INSURANCE	:	
COMPANY	:	
Defendants,	:	
	:	
APG-AMERICA, INC.	:	
Plaintiff on Counterclaim,	:	**NO. 02-5379**
	:	
v.	:	
	:	
XL SPECIALTY INSURANCE	:	
COMPANY and	:	
NAC REINSURANCE CORPORATION	:	
Defendants on Counterclaim.	:	
	:	

O R D E R

AND NOW, this 31st day of August, 2005, following a non-jury trial in this case, the Court having issued Findings of Fact and Conclusions of Law on said date covering the liability issues, **IT IS ORDERED** that, on or before September 14, 2005, the parties shall endeavor to reach agreement on all damages issues and shall submit to the Court a proposed form of judgment covering all damages issues.[11]

IT IS FURTHER ORDERED that, in the event the parties are unable to reach agreement on all damages issues, they shall, on or before September 14, 2005, (a) file and serve a

[11]Any agreement by APG to the form of a judgment is without prejudice to APG's right to challenge the Court's ruling on appeal or in any other appropriate manner.

joint report in which they set forth all damages-related issues on which they have reached agreement, stating details, and (b) separately identify each damages issue on which they have not reached agreement, setting forth their respective positions on each issue. Two (2) copies of the joint report shall be served on the Court (Chambers, Room 12613) when the original is filed.

BY THE COURT:

/s/ Honorable Jan E. DuBois

JAN E. DUBOIS, J.